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In the Supreme Court of the United States

OCTOBER TERM, 1958

MAX PADDEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

Case:

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OPINION BELOW

The per curiam opinion of the Court of Appeals (R. 152–153; Pet. App.) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1958 (R. 154). The petition for a writ of certiorari was filed on January 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was given a fair trial when, in response to the jury's request for a further interpretation of the meaning of obscenity, the trial judge

repeated and enlarged upon previously given instructions approved by this Court in *Roth* v. *United States*, 354 U.S. 476, until satisfied that the jury understood this judicially approved standard.

STATEMENT

Following a jury trial in the District Court for the Southern District of New York, petitioner was convicted of shipping obscene books in interstate commerce in violation of 18 U.S.C. 1462 (R. 35). He was sentenced to two years imprisonment and fined $5,000 plus the cost of prosecution. Execution of the prison sentence was suspended and petitioner was placed on probation for 5 years (R. 57–58; 38–56). In a *per curiam* opinion, the Court of Appeals unanimously affirmed (R. 152–153).

1. It was stipulated at the trial that on May 22, 1957, petitioner, knowing the contents thereof, deposited with the ABC Freight Forwarding Corporation, a common carrier, for interstate transportation, 101 books and pamphlets including five copies each of "Virgins Come High", "Sex Factory", "Wheel of Violence", "Celeste" and "Come-on Girl" (R. 86–87). The single issue for the jury was whether these volumes were obscene. No witnesses were called, the government relying solely upon contents of the books which were introduced into evidence (R. 87). Portions thereof were read by counsel to the jury.

2. The pertinent portion of the trial judge's original instructions to the jury was as follows (R. 12–13; 11–16):

"As I have told you before, you must distinguish between sex and obscenity. They are not synonymous. Every book that deals with sex, naturally, is not obscene. Obscene material is material which deals with sex in a manner appealing to prurient interests.

"The matter, the reading matter taken as a whole, the book taken as a whole, any one of them, must be calculated to corrupt and debauch the mind and morals of those in whose hands it may fall. It must tend to stir sexual impulses and lead to sexually impure thoughts.

"The test is not whether it will arouse sexual desires or sexually impure thoughts in those comprising a particular segment of the community, such as the young, the immature, or the highly prudish, or would leave another segment such as the scientific or the highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. It must be such as will excite or incite that prurient interest in the average person in whose hands that material may fall.

* * * * *

"'Filthy', as I said, as used in the statute, must also relate to sexual matters. It is distinguishable from the term 'obscene', which tends to promote lust and impure thoughts. 'Filthy' pertains to that sort of treatment of sexual matters in such a vulgar and indecent way that it tends to arouse a feeling of disgust and revolt.

"To sum up, a book is obscene if, considered as a whole, its predominant appeal is to prurient interests, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond cus-

tomary limits of candor in description or representation of such matters.

* * * * *

"In other words, you determine its impact upon the average person in the community. The books must be judged as a whole in their entire context, and you are not to consider detached or separate portions in reaching a conclusion."

No exceptions were taken to the charge (R. 20).

The jury retired for its deliberation at 5:19 p.m. At 9 p.m. it made a request for a dictionary (R. 21). Counsel agreed with the judge's view that this request should be denied (R. 23). The court then called the jury into the court room, where the foreman stated that the jurors "would like a further illustration or interpretation of the word" obscene (R. 23–24). Thereupon the judge reread his original charge, *supra,* pp. 3–4 (R. 24–25), and was informed by the foreman that it helped "very much" (R. 26). Juror #9 then asked if it would be permissible to take a copy of what the judge had said into the jury room so that they could "refresh [their] thinking" (R. 26). The trial judge refused this request, but reread the relevant portion of his charge (R. 26–27). Thereupon, petitioner's counsel requested that the court read to the jury some additional language used by this Court in *Roth* v. *United States,* 354 U.S. 476, 488–489. This the trial judge did [1] (R. 29). The judge then inquired if the jury had any further questions and

[1] "* * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

reread one sentence of his charge upon request (R. 29–30). Asked by juror #6 to define "customary candor", which was used in the charge, the judge explained this term (R. 30–31). When petitioner's counsel objected to the restatement by the judge of the meaning of the word "filthy", the judge noted that he had charged in the language of the *Roth* case; that no objection had been taken to the definition of "filthy" in the original charge; and that he believed that the jury was requesting a definition of "obscene" in the generic sense (R. 28–29).

At 12 midnight the jury submitted the question of whether they were allowed to find petitioner guilty with a recommendation for leniency (R. 33). The judge explained to them that it was their province only to determine guilt or innocence and that the duty of imposing sentence was the court's (R. 33–34). Petitioner's counsel took exception to these remarks, claiming that the judge should have merely said no to this inquiry (R. 34). The jury returned with a guilty verdict at 12:25 a.m. (R. 34–35).

ARGUMENT

Petitioner argues that the trial judge failed to clear up the juror's confusion as to the meaning of the word "obscene", in that the judge's subsequent explanations were merely restatements of his original instructions. However, as shown by the record, the trial judge took great pains to define, as clearly and as correctly as possible, the meaning of obscenity in accord with standards adopted by the Court in *Roth v. United States*, 354 U.S. 476. As petitioner acknowl-

edges, the original instructions were unexceptionable in this regard, closely paralleling the instructions approved in *Roth* (354 U.S. at 487, n. 20, 490). Moreover, when the jury indicated its desire for further elucidation, the trial judge patiently repeated these approved instructions, attempting further clarification by including additionally, at the suggestion of petitioner's counsel, the precise language used in the *Roth* opinion. Only when the jury appeared satisfactorily to understand this definition, did the trial judge permit them to withdraw again and consider their verdict.

There is no merit to petitioner's further claim that the judge confused the jury by equating the term "obscene" with the term "filthy". As already noted, *supra*, p. 5, no objection had been taken to the original instructions defining this term which is included in the statute. And certainly the judge was quite correct in repeating all the judicially approved definitions of the terms used in the statute, upon the jury's request.

Apparently, petitioner is of the opinion that the trial judge was required to go beyond accepted criteria as to the meaning of obscenity and provide the jury with some formula which it could apply automatically to reach a decision. This, of course, is unattainable when dealing with obscenity. In *Roth*, the Court recognized that the term was not subject to precise mathematical definition (354 U.S. at 491-492). Nonetheless, it held that the reasonable standard developed in the case law through the years could be fairly applied by juries to condemn the prurient, while affording adequate protection to speech within

the purview of the First Amendment. This was the standard used here; and such was the result. As the Court of Appeals held: "Under *United States* v. *Roth*, 354 U.S. 476, the jury was entitled to find the dreary pornography here placed before it obscene * * *. The trial judge committed no error in repeating his proper and adequate definition of obscenity in response to the jury's question, * * *" (R. 153).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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